

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST, et al.,)
Plaintiffs,)
vs.)
MAUI ONE EXCAVATING, INC., et al.,)
Defendants.)

Case No. 2:12-cv-00338-KJD-NJK
**ORDER SANCTIONING GARY
BRANTON**

On February 22, 2013, the Court ordered attorney Gary Branton to show cause for a second time why he should not be sanctioned pursuant to Local Rule IA 4-1, Fed. R. Civ. P. 16(f), the Court’s inherent authority and/or 18 U.S.C. § 1927. Docket No. 29 (“Second Order to Show Cause”). That Second Order to Show Cause arose out of Mr. Branton’s failure to appear for the hearing set for February 21, 2013 (“Second Hearing”) and his failure to file with the Court a declaration that he notified Defendants of the requirement that they appear at that hearing. *See id.*; *see also* Docket No. 27. The Court has received a written response from Mr. Branton. *See* Docket No. 30.¹ Having reviewed that response, for the reasons stated below, the Court hereby

¹ The response did not request a hearing on the Second Order to Show Cause and the Court finds that holding a hearing is unnecessary. See Local Rule 78-2.

1 **I. STANDARDS**

2 Parties are required to follow court orders. *See, e.g.*, Fed. R. Civ. P., Rule 16(f).² Rule 16(f)
 3 requires parties to comply with pretrial orders and provides that a judge may order appropriate
 4 sanctions, as outlined in Rule 37(b)(2)(A)(ii)-(vii), for non-compliance. Whether the party and/or its
 5 counsel disobeyed the court order intentionally is impertinent; sanctions may be imposed when the
 6 parties and their counsel disobey a court order. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 769 (9th Cir. 2001) (sanctions may be imposed when disobedience of
 7 order is unintentional). Rule 16(f) “was designed not only to insure the expeditious and sound
 8 management of cases for trial, but to deter conduct that unnecessarily consumes ‘the Court’s time
 9 and resources that could have been more productively utilized by litigants willing to follow the
 10 Court’s procedures.” *Martin Family Trust v. Heco/Nostalgia Enterps. Co.*, 186 F.R.D. 601, 603
 11 (E.D. Cal. 1999) (quoting *Mulkey v. Meridan Oil, Inc.*, 143 F.R.D. 257, 262 (W.D. Okla. 1992)).

12 Similarly, the Local Rules make clear that the Court may “impose any and all appropriate
 13 sanctions” on attorneys who, without just cause, either fail to appear when required for argument on
 14 a motion or otherwise fail to comply with any order of the Court. Local Rule IA 4-1.

15 **II. BACKGROUND**

16 On February 1, 2013, the Court issued a minute order setting a hearing on Attorney Gary
 17 Branton’s motion to withdraw as attorney of record for Defendants. Docket No. 21. The Court’s
 18 minute order indicated that

19 Defendants Maui One Excavating, Inc., Paitaka Miyahira and Tasey Miyahira are
 20 hereby ordered to attend the hearing. Any new counsel retained to represent
 21 Defendants in this matter is also ordered to attend. THERE WILL BE NO
 22 EXCEPTIONS TO THESE APPEARANCE REQUIREMENTS.

23 Docket No. 21 (emphasis in original).

24 Notwithstanding the explicit requirement that Defendants appear at the hearing, none of
 25 them did so. *See* Docket No. 22. Instead, Mr. Branton indicated at the hearing that he never
 26 provided them notice of the Court’s order that they appear. The Court then issued its first order to

27

28 ² References to “Rules” hereafter refer to the Federal Rules of Civil Procedure.

1 show cause why Mr. Branton should not be sanctioned for failing to comply with the Court's order.
 2 Docket No. 24. Mr. Branton responded, indicating that he had no legitimate excuse for his
 3 shortcoming and that he "fully understand[s] now that [he is] the attorney of record for the
 4 Defendants until relieved of that responsibility by the Court." Docket No. 25 at 2. The Court
 5 discharged that order to show cause, but cautioned Mr. Branton that he was expected "to fully
 6 comply with Court orders in the future." Docket No. 26.

7 Concurrently with the first order to show cause, the Court issued a minute order scheduling
 8 the Second Hearing on Mr. Branton's motion to withdraw as counsel. Docket No. 23 ("Second
 9 Minute Order"). The Second Minute Order stated in relevant part that:

10 The Court hereby schedules a hearing on the pending motion to be held on February
 11 21, 2013 at 3:00 p.m. in Courtroom 3D. Defendants Maui One Excavating, Inc.,
 12 Paitaka Miyahira and Tasey Miyahira are hereby ordered to attend the hearing. Any
 13 new counsel retained to represent Defendants in this matter is also ordered to attend.
 14 **THERE WILL BE NO EXCEPTIONS TO THESE APPEARANCE
 REQUIREMENTS.** No later than February 14, 2013, Mr. Branton shall notify
 Defendants of this order that they appear and shall file with the Court a declaration
 indicating the manner in which he notified them.

15 Docket No. 23 (emphasis in original).

16 Nonetheless, and despite the Court's explicit warning that Mr. Branton must comply with
 17 Court orders, Mr. Branton failed to file with the Court a declaration indicating the manner in which
 18 he notified Defendants the requirement that they appear at the Second Hearing. Moreover, on
 19 February 21, 2013, the Court called the Second Hearing as scheduled. Docket No. 27.
 20 Unfortunately, neither Mr. Branton, his clients, nor any new attorney representing his clients
 21 appeared. *See id.*³ As Mr. Branton acknowledged only a few days earlier, this Court had not
 22 granted his motion to withdraw as counsel and he remained "the attorney of record for the
 23 Defendants until relieved of that responsibility by the Court." Docket No. 25 at 2.

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 28 ³ Plaintiff's counsel did appear. *See* Docket No. 27.

1 The Court then issued the Second Order to Show Cause why Mr. Branton should not be
 2 sanctioned for his shortcomings in relation to the Second Minute Order and the Second Hearing.⁴ It
 3 is that Second Order to Show Cause that is now before the Court.⁵

4 **III. ANALYSIS**

5 The Second Order to Show Cause identified two shortcomings by Mr. Branton: (1) that he
 6 failed to file a declaration indicating that he had provided notice to his clients of the Second Hearing
 7 and (2) that he failed to attend the Second Hearing himself. *See* Docket No. 29 at 2. Mr. Branton
 8 responded that he is blameless for those shortcomings because he never received notice of the
 9 Second Minute Order setting the Second Hearing and requiring that he notify Defendants of that
 10 hearing. *See* Branton Decl. ¶ 10 (Docket No. 30). He further indicates that he searched his email
 11 files for such a notice once he received the pending Second Order To Show Cause, but could not
 12 locate any record that the notice was received. *See id.* at ¶¶ 3, 4, 8.

13 In addition to Mr. Branton's declaration, however, the Court also has before it significant
 14 evidence contradicting his assertion. Notice of the Second Minute Order was sent through the
 15 Court's CM/ECF system. *See* Attachment 1 (Notice of Electronic Filing ("NEF")). The NEF makes
 16 clear that notice was sent both to Mr. Branton at gary@garybrantonlaw.com and to his assistant at
 17 rhonda@garybrantonlaw.com at 12:17 p.m. (PST) on February 12, 2013. *Id.* at 2.⁶ The NEF
 18 establishes that notice was properly sent, creating a presumption of delivery and receipt that Mr.
 19 Branton bears the burden of rebutting. *See American Boat Co. v. Unknown Sunken Barge*, 567 F.3d
 20

21 ⁴ The Court simultaneously issued an order to show cause why sanctions should not be imposed
 22 against Defendants. Docket No. 28. The Court discharged that order to show cause, but explained that
 23 it would rule separately on sanctions as to Mr. Branton. *See* Docket No. 31 at 1 n.1.

24 ⁵ After the Second Order to Show Cause was issued, the parties stipulated to dismissal of this
 25 case. *See* Docket No. 36. Nonetheless, the Court retains jurisdiction to impose sanctions. *See, e.g.,*
United Energy Owners Committee v. United States Energy Mgmt. Sys., Inc., 837 F.2d 356, 358 (9th Cir.
 26 1988) (district court retains jurisdiction to impose sanctions after entry of judgment and filing of
 appeal).

27 ⁶ Mr. Branton's response is silent as to whether his assistant received the NEF and/or whether
 28 Mr. Branton searched her email files.

1 348, 352-53 (8th Cir. 2009). Mr. Branton's only evidence to overcome this presumption is his
 2 statement in his declaration that he did not receive notice of the Second Minute Order, which is
 3 plainly insufficient. *See Singh v. Arrow Truck Sales, Inc.*, 2006 WL 1867540, *1 (E.D. Cal. July 5,
 4 2006) (finding NEF showed counsel had notice of order, notwithstanding counsel's statements in
 5 declaration that notice of order was never received, and sanctioning counsel under Rule 16(f)).

6 While the NEF alone is sufficient to find that Mr. Branton had proper notice in this case,
 7 additional evidence before the Court confirms that fact. Importantly, the Court tracks not only the
 8 sending of its email notifications, but also the delivery of its e-mail notifications through the
 9 Administrative Office's Case E-Mail Notification Tracking System ("CENTS"). The CENTS
 10 records in this case confirm that the email notification was successfully delivered to Mr. Branton
 11 and his assistant on February 12, 2013. *See* Attachments 2, 3 (indicating that "Message Successfully
 12 delivered").⁷

13 In light of the evidence before the Court, Mr. Branton has failed to rebut the presumption
 14 that he received notice of the Second Minute Order. Given that he provides no other possible
 15 justification for his conduct, the Court finds that sanctions are appropriate pursuant to Rule 16(f) and
 16 Local Rule IA 4-1. The Court has broad discretion in fashioning the appropriate sanctions. *See,*
 17 *e.g.*, *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1397 (9th Cir. 1993). The Court may award
 18 any "just" sanctions under Rule 16(f) and "any and all appropriate" sanctions under Local Rule IA
 19 4-1. In determining the appropriate sanction, the Court notes that a primary objective of Rule 16(f)
 20 is the deterrence of similar misconduct. *Martin Family Trust*, 186 F.R.D. at 604.⁸

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22 ⁷ A number of other factors also support a finding that Mr. Branton had notice of the Second
 23 Minute Order. First, Mr. Branton has received a number of other notices through the Court's CM/ECF
 24 system. *See, e.g.*, Docket No. 25 at 2 (discussing NEF received for hearing set for February 7, 2013).
 25 Second, Mr. Branton's opposing counsel appeared at the Second Hearing, suggesting that he received
 26 notice of it. *See* Docket No. 27 (noting appearance of Plaintiff's counsel at hearing). Lastly, Mr.
 27 Branton failed to provide any evidence of a CM/ECF outage at the time of the notice.

28 ⁸ The Court also considers the resources wasted by the opposing party due to the violation of the
 29 Court order. *See, e.g.*, Federal Rule 16(f)(2). To that end, the Court invited Plaintiff's attorney to
 30 submit a declaration of his fees. *See* Docket No. 29 at 1. Such a declaration was not received, so the
 31 Court will not award attorney's fees to Plaintiff.

1 The Court finds that a \$300 sanction is appropriate here. The sanction is personal to Mr.
2 Branton. Payment of the \$300 shall be made *within ten days*, as a court fine, to the "Clerk, U.S.
3 District Court." Mr. Branton shall submit proof of payment to the undersigned Judge's chambers
4 within five days of payment.

5 **IV. CONCLUSION**

6 For the reasons discussed above, the Court hereby **SANCTIONS** Mr. Branton personally in
7 the amount of \$300, pursuant to Federal Rule 16(f) and Local Rule IA 4-1.

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9 IT IS SO ORDERED.

10 DATED: May 7, 2013.

11
12 NANCY J. KOPPE
13 United States Magistrate Judge

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Attachment 1

MIME-Version:1.0

From:cmeccf@nvd.uscourts.gov

To:cmeccfhelpdesk@nvd.uscourts.gov

Bcc:

--Case Participants: Gary G Branton (gary@garybrantonlaw.com, rhonda@garybrantonlaw.com), Norman H. Kirshman (kirshmanlaw@yahoo.com), Emily Z Manninger (emily@luch.com, manning@luch.com), Nathan R. Ring (adenni@theurbanlawfirm.com, kopenbrier@theurbanlawfirm.com, murban@theurbanlawfirm.com, nring@theurbanlawfirm.com, pklausky@theurbanlawfirm.com, sgallo@theurbanlawfirm.com, smcdonald@theurbanlawfirm.com, vhernquist@theurbanlawfirm.com), Michael A Urban (adenni@theurbanlawfirm.com, kopenbrier@theurbanlawfirm.com, murban@theurbanlawfirm.com, nring@theurbanlawfirm.com, pklausky@theurbanlawfirm.com, sgallo@theurbanlawfirm.com, smcdonald@theurbanlawfirm.com, vhernquist@theurbanlawfirm.com), Judge Kent J. Dawson (kjd_chambers@nvd.uscourts.gov), Magistrate Judge Nancy J. Koppe (katie_blakey@nvd.uscourts.gov, nancy_koppe@nvd.uscourts.gov, njk_chambers@nvd.uscourts.gov)

--Non Case Participants:

--No Notice Sent:

Message-Id:<6072442@nvd.uscourts.gov>

Subject:Activity in Case 2:12-cv-00338-KJD-NJK Trustees of the Operating Engineers Pension Trust et al v. Maui One Excavating, Inc. et al Minute Order

Content-Type:text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 2/12/2013 at 12:17 PM PST and filed on 2/12/2013

Case Name: Trustees of the Operating Engineers Pension Trust et al v. Maui One Excavating, Inc. et al

Case Number: 2:12-cv-00338-KJD-NJK

Filer:

Document Number: 23(No document attached)

Docket Text:

MINUTE ORDER IN CHAMBERS of the Honorable Magistrate Judge Nancy J. Koppe, on 2/12/2013. RE: [20] MOTION to Withdraw as Attorney by Gary G. Branton. Pending before

the Court is a motion to withdraw as attorney of record filed by Gary Branton. Docket No. 20. The Court hereby schedules a hearing on the pending motion to be held on February 21, 2013 at 3:00 p.m. in Courtroom 3D. Defendants Maui One Excavating, Inc., Paitaka Miyahira and Tasey Miyahira are hereby ordered to attend the hearing. Any new counsel retained to represent Defendants in this matter is also ordered to attend. THERE WILL BE NO EXCEPTIONS TO THESE APPEARANCE REQUIREMENTS. No later than February 14, 2013, Mr. Branton shall notify Defendants of this order that they appear and shall file with the Court a declaration indicating the manner in which he notified them. With respect to Defendant Maui One Excavating, Inc., the Court wishes to highlight that it must retain counsel expeditiously as corporations may appear in federal court only through licensed counsel. U.S. v. High Country Broad. Co., Inc., 3 F.3d 1244, 1245 (9th Cir. 1993). IT IS SO ORDERED. (Copies have been distributed pursuant to the NEF - TM)

2:12-cv-00338-KJD-NJK Notice has been electronically mailed to:

Gary G Branton gary@garybrantonlaw.com, rhonda@garybrantonlaw.com

Michael A Urban murban@theurbanlawfirm.com, adenni@theurbanlawfirm.com, kopenbrier@theurbanlawfirm.com, nrng@theurbanlawfirm.com, pklausky@theurbanlawfirm.com, sgallo@theurbanlawfirm.com, smcdonald@theurbanlawfirm.com, vhernquist@theurbanlawfirm.com

Norman H. Kirshman kirshmanlaw@yahoo.com

Emily Z Manninger manningert@luch.com, emily@luch.com

Nathan R. Ring adenni@theurbanlawfirm.com, kopenbrier@theurbanlawfirm.com, murban@theurbanlawfirm.com, pklausky@theurbanlawfirm.com, sgallo@theurbanlawfirm.com, smcdonald@theurbanlawfirm.com, vhernquist@theurbanlawfirm.com

2:12-cv-00338-KJD-NJK Notice has been delivered by other means to:

Attachment 2



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gary@garybrantonlaw.com - 1010

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Envelope and Header Information

Sender: cmevf@nvd.uscourts.gov

Recipients: gary@garybrantonlaw.com

Activity in Case 2:12-cv-00338-KJD-NJK Trustees of the Operating

Subject: Engineers Pension Trust et al v. Maui One Excavating, Inc. et al Minute Order

Message-ID
Header: 6072442@nvd.uscourts.gov

Message Size: 4.57 (KB)

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Sending Host IP
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Message Delivery Information

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-05 gary@garybrantonlaw.com at
50.57.0.16. Response '2.0.0 Ok:
queued as 99/48-05369-663AA115'

Logged in as: guest@nvd.uscourts.gov ([Logout](#))

Questions/Comments? dc@support.aotx.uscourts.gov

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7550 IH-10 West, Suite 1100
San Antonio, TX 78229-5818

Attachment 3



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Sender: cmeclf@nvd.uscourts.gov

Recipients: rhonda@garybrantonlaw.com

Activity in Case 2:12-cv-00338-KJD-NJK Trustees of the Operating

Subject: Engineers Pension Trust et al v. Maui One Excavating, Inc. et al Minute Order

Message-ID: 6072442@nvd.uscourts.gov
Header:

Message Size: 4.57 (KB)

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Message **Timestamp:** 02/12/13 15:17:46 -05

Sending Host IP
Address: 156.131.15.135

Message Delivery Information

02/12/13 15:17:47 Message Successfully delivered to
-05 rhonda@garybrantonlaw.com at
50.57.0.16. Response '2.0.0 Ok:
queued as D9/58-05369-B63AA115'

Logged in as: guest@nvd.uscourts.gov ([Logout](#))

Questions/Comments? dc@support.aotx.uscourts.gov

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San Antonio, TX 78229-5818